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CASES AND MATERIALS ON ENVIRONMENTAL LAW

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INTRODUCTION

In preparing an introductory course on environmental law and for such purposes selecting and rejecting materials for study, one is faced with two very difficult problems. The first is that while there is a wealth of material in other jurisdictions relating to environmental law matters, from a lawyer's point of view there is still relatively little in Canada which can properly be considered as appropriate for a casebook such as this. The second problem is to attempt to delineate the scope of the course in such a way that one can canvass the field in a meaningful way while at the same time studying some problems in depth.

Accordingly it is important at the outset to understand the goal of the course and of this collection of materials.

1. The first goal is to sharpen the perception of law students as to the various environmental problems which face our community. Having said this it should be noted that very little material is included with the specific purpose of spotlighting the problem. It is not considered to be the scope of this course or these materials to persuade people that we face environmental problems of very large proportions indeed. It is hoped that a reading of the materials will help to increase our perceptions of the problem.

2. The second purpose of this course is to examine in some detail the specific role which a lawyer as such can play in this area of the law. In this course the lawyer's role and how he can participate in a professional capacity in the problems in this area of law will be canvassed in some detail. Emphasis will be given throughout the course on the steps which a lawyer can take to assist clients in coming to grips with environmental problems. Relatively less attention will be paid to policy matters which, it is conceived, are beyond the scope of this course.

Having said this however one cannot deal with a course in environmental law in the abstract. Therefore, throughout the term students will be asked to consider the problems raised by the economic system in North America and the concepts behind it which have given rise to some of the very problems which we now encounter. A new perspective to an old problem of competing interests has clearly been added by the energy problems now emerging. The article at page I-35 illustrates what is perceived as a growing antipathy to environmentalists a point of view which will clearly become more strident in the months ahead.

Finally, the question must be asked and answered "Are the remedies now available adequate to deal with the problems?" As well in considering the issues raised throughout this course and the various methods of dealing with them one must surely come to personal conclusions with respect to how serious the consequences of environmental disruption are at present and how serious they are likely to be in the future.

CHAPTER I

THE PROBLEM

There is to say the least no unanimity with respect to either the serious nature of the environmental problems facing our community nor with what steps are either available or possible to deal with them. The materials in the first part of this chapter are designed to stimulate the reader's mind as to some of the problems which are to be encountered. In deciding whether present remedies are adequate and present legislation suitable for dealing with the problem, one has to have an informed opinion as to the nature and extent of the problem which is to be faced. While no attempt is made to be definitive and students must realize this in considering the material, nevertheless one cannot look at the subject in the abstract without coming to grips with respect to an assessment of this kind.

If a plant is polluting in such a way as to have an effect on the people in the neighbourhood, the obvious remedy is to close it down. The question of what effect this has upon those who are unemployed as a result and upon their families is one which, it has been said environmentalists consider far too infrequently. It is surely true that while it is very difficult to deal adequately with environmental problems in the abstract and although it is necessary to approach the problem with some philosophy, it is also necessary to approach this subject with an openness of mind and a readiness to deal with individual situations as they arise.

The first article and the following materials illustrate the difficult questions which must be answered.

CHAPTER II

THE LAWYER'S ROLE

Assuming that one has come to the conclusion that environmental matters involve problems of major proportion, a position with which one can hardly argue, then those who approach the subject as lawyers must consider what is the appropriate posture to take as a member of the legal profession with respect to these matters. It is one thing to become involved in the environmental movement in a common capacity with other concerned individuals. It is quite another to bring specialized training and a skill to the problem.

It is certainly fair to say that in this jurisdiction too few lawyers have concerned themselves with environmental issues. The reasons for this are many but it is perhaps fair to assume that governments and industry can always make sure that they are well represented in environmental issues, while such is not always the case with respect to private individuals.

Accordingly it is time to ask the question "What should the lawyer's role be in environmental matters?" Indeed this is a question which must be considered by students throughout the course. The articles following take some account of the position which a lawyer can occupy.

CHAPTER III

THE PUBLIC'S ROLE

Historically the role of a member of the public in environmental matters has, by and large, been restricted to objecting to those environmental matters which have a distinct and peculiar impact on him as an individual. The common law rights of individuals will be considered in detail in a later chapter of this book. In the meantime, however, two other areas in which individuals have asserted some rights have been established, the first being the role of the individual as a private prosecutor under various criminal and quasi-criminal statutes, and the second being the role of the individual in making representations with respec' to environmental impact.

As for the first, materials are reproduced in this book dealing with the role of the private prosecutor and his status or lack of it. As well, the role of the public with respect to the assessment of environmental impact is now presently under consideration. The government of Ontario has issued a "Green Paper on Environmental Assessment", copies of which are being made available to all. A reading of this paper may leave one with the feeling that the government of this province is still very uncertain as to the way, if any, in which the public should participate in environmental assessment.

CHAPTER IV

THE PRIVATE RESPONSE - THE COMMON LAW REMEDIES

This section of the materials deals with the common law rights which individuals have to protect the environment. Throughout this section students should keep certain questions before them and determine for themselves the answers. Some of these questions are as follows:

1. Can private actions by injured individuals against polluters make a major contribution to water pollution control or air pollution control?
2. Would strengthening these private remedies and making private recoveries more certain have a significant effect on the general problem of water and air pollution?
3. Are the courts satisfactory institutions to deal with environmental matters?
4. If the remedies outlined in this chapter, which are available to individuals, are not effective methods of protecting the environment, is there a good argument that can be made for strengthening the remedies which are available?

It is suggested that students will find that at best private actions are a crazy quilt of remedies which do not provide really adequate protection except in the particular case of the individual who has been injured and even then the protection may not be as satisfactory as it should be. The common law has grown like topsy over a period of years and arises out of economic conditions and social conditions significantly different from those which exist to-day. Accordingly it is suggested that an examination of the common law remedies will lead one to the conclusion that new administrative bodies are required and that adequate environmental protection cannot be obtained by the rules of law established in the cases following.